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Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1853

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION TO PROCEED IN FORMA PAUPERIS

BARRY L. MORRIS
Attorney at Law
580 Grand Avenue
Oakland, California 94610
415-839-1288
Attorney for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, BERNARD LEE HAMILTON, respectfully requests that this Court deny the petition for writ of certiorari.

A.

Introduction

In its petition for writ of certiorari, petitioner attacks the ruling of the California Supreme Court in the

instant case on two bases: Petitioner contends that the California Supreme Court improperly ruled that the California death penalty law required a finding of "intent to kill" under the compulsion of Enmund v. Florida, 458 U.S. 782 (1982), and that the court's ruling on the standard of prejudice based upon Connecticut v. Johnson, 460 U.S. 73 (1983) was improper in view of this Court's ruling in Cabana v. Bullock, 474 U.S. _____, 106 S.Ct. 689 (1986). It is respondent's position that the California Supreme Court's ruling on "intent to kill" was based strictly on that court's interpretation of state law, and that the court correctly applied the principles of Connecticut v. Johnson in determining the appropriate standard of prejudice.

B.

The Ruling of the California Supreme Court Requiring that "Intent to Kill" be Shown in Order to Establish a Special Circumstances was Based Strictly on State Law

In the instant case, the jury was not instructed that they must find that respondent "intended to kill" the victim before they could find that the special circumstances alleged in the instant case were true. On the basis of its decision in Carlos v. Superior Court, 35 Cal.3d 131 (1983), the Supreme Court of California reversed respondent's conviction. People v. Hamilton, 41 Cal.3d 408 (1985).

The death penalty law under which respondent was prosecuted was adopted by initiative in 1978. It embodies a two-stage proceeding for a capital trial which confers upon a capital defendant the right to a jury determination of guilt, the truth of the special circumstances alleged and penalty. In the first stage, the jury is instructed that they must first determine whether or not the defendant is guilty of first degree murder, and that if they arrive at such a conclusion, they must then determine whether or not the murder was of a

type described in one of 19 categories of "special circumstances." Only if the jury determines beyond a reasonable doubt that the murder was a "special circumstance" murder do they go on to the second stage, which is the penalty determination. (California Penal Code section 190 et seq.)

In Carlos v. Superior Court, supra, the California Supreme Court examined the statutory scheme enacted by the voters in 1978 to determine whether or not "intent to kill" was required where the special circumstance alleged was a felony murder (robbery) special circumstance. In 10 of the 19 special circumstances listed, the statute clearly requires proof of intent to kill. In subdivision 17 of the special circumstance law, the felony murder special circumstance, the statute does not expressly articulate a requirement of proof of "intent to kill". The Court noted, however, that construing that paragraph without an intent to kill requirement would have "anomalous results":

> "Five of the felonies listed in that paragraph: arson, rape, robbery, burglary and child molesting -- also appear in section 189, the statutory felony murder provision. As to these offenses, an unintentional killing in perpetration of the felony, raised to first degree murder by operation of section 189, would without further proof constitute a special circumstance under paragraph 17. The remaining four felonies -- kidnapping, sodomy, oral copulation, and train wrecking -- are not enumerated in section 189. Since it is clear that in virtually every case an intent to kill would be required to render a death occurring the course of one of these four felonies a first degree murder -- a prerequisite to any special circumstance finding (section 190.2, subd. (a)) -- a defendant who kills unintentionally during the commission of those offenses is not subject to the death penalty or imprisonment without possibility of parole." 35 Cal.3d at 140-141 (footnotes omitted)

If the statute were construed literally, the result would be,

> "difficult to defend. A defendant who killed unintentionally during a robbery or rape could be convicted of first degree murder with special circumstances and executed, while one who killed unintentionally during a kidnapping for robbery or forceable sodomy could not be convicted of first degree murder and thus could not be executed." Ibid.

The Court noted that section 190.2(b) provides,

> "Every person whether or not the actual killer found guilty of intentionally aiding and abetting . . . any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without possibility of parole,"

and that for most of the special circumstances, including subdivision 17,

> "A uniform and sensible interpretation of the subdivision would read it as imposing an intent to kill requirement for the accomplice to any felony murder, and by implication such a requirement for the actual killer himself." 35 Cal.3d at 142.

After reviewing the history and purpose of the 1978 initiative, the Court concluded,

> "that the history of the initiative, as well as its wording, supports a construction limiting the felony murder special circumstances to persons who intend to kill or aid in a killing."

The Court reasoned that although the language of the 1978 initiative, "indicates, but does not compel, the conclusion that intent to kill is required . . .," the rules of statutory construction serve to, "reinforce our view that the statute does not permit punishment of an unintentional felony murder by death or life imprisonment without possibility of parole." Id., at 147.

Petitioner's repeated assertions that Carlos is predicated on a misinterpretation of federal law (Pet. 19, 29) are simply wrong. Although the Carlos Court reviewed federal precedents, it did so only under the general principle that a

court,

> "when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity. Id., at 147.

The California Supreme Court did not rule that the statute violated the principles of Enmund, but instead simply noted that,

> "The question of whether the felony murder special circumstance can constitutionally be applied to any defendant, including the actual killer, who did not intend or contemplate a killing appears to be a substantial and as yet unsettled constitutional issue under the Eighth Amendment." Id., at 151 (emphasis added)

In short, the California Supreme Court did not hold that a statute lacking a requirement of intentionality was unconstitutional under the Federal Constitution. Rather, as a matter of state law, it:

> "construe[d] the word 'intentionally' in subdivision (b) of section 190.2 to apply to all defendants -- actual killers and accomplices alike -- and to require an intent to kill before a defendant is subject to a special circumstance finding under paragraph 17 of that section." Id. at 153-154.

C.

The California Supreme Court Correctly Applied this Court's Test of Prejudice as Outlined in Connecticut v. Johnson

The California Supreme Court ruled in the instant case that the trial court's failure to instruct the jury that they must find "intent to kill" before they could find the allegations of special circumstances to be true was prejudicial under the standard of prejudice outlined in People v. Garcia, 36 Cal.3d 539 (1984). In Garcia, the California Supreme Court reviewed this Court's decision in Connecticut v. Johnson, supra, and concluded that it established the rule that where a

factual matter that should have been decided by the jury was removed from its consideration by a trial court's instruction, the error was reversible per se.

> "At least eight justices of the United States Supreme Court (all except Justice Stevens, who took no position on the issue) agreed that a jury instruction which does take an issue completely from the jury is reversible per se. We have no doubt that they would reach the same conclusion if the error was one of omission -- failing to submit the issue of intent to the jury." Garcia, supra, 36 Cal.3d at 554.

The California Supreme Court went on to establish a harmless error test which provides that the error is reversible per se unless one of four exceptions is present:

> "1. The erroneous instruction was given in connection with an offense for which the defendant was acquitted and . . . the instruction had no bearing on the offense for which he was convicted";
>
> "2. The defendant conceded the issue of intent";
>
> "3. The factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions"; or
>
> "4. Where the parties recognized that intent to kill was an issue, presented all evidence at their command on that issue, and the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration". 36 Cal.3d at 554-556.

In its petition for writ of certiorari, petitioner takes the view that this Court's recent decision Cabana v. Bullock, supra, "indicates that the California Supreme Court's reliance on Connecticut v. Johnson in Garcia was misplaced." (Pet. 26). Petitioner is wrong.

First, in Cabana, supra, the defendant was convicted under a Mississippi statute which, as construed by the Mississippi Supreme Court, did not require proof of intent to kill before the death penalty could be imposed. The Fifth

Circuit granted the defendant's petition for habeas corpus on the ground that he was convicted and sentenced to death without requiring the jury to find that he intended to kill, in violation of the principles of Enmund. This Court reversed on the ground that where state law does not require proof under its own statutory scheme of intent to kill before the death penalty can be imposed, Enmund does not mandate that a jury make that finding.

> "[I]f a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can adequately be remedied by any court that has the power to find the facts and vacate the sentence. Cabana, supra, 106 S.Ct. at 697.

This Court specifically noted that where the requirement of "intent to kill" is established by state law, "the due process clause implies that appellate findings do not suffice to protect that entitlement." Id., at 697-698, n.4.

Clearly, Cabana did not apply to the instant case because the "intent to kill" requirement was imposed by the California Supreme Court as a requirement of state statutory interpretation, not federal constitutional law.

Second, the requirement that the jury find "intent to kill" under the California death penalty law is not part of the sentencing proceedings, but rather is part of the guilt phase trial. As noted above, under California law a jury is required to find intent to kill, along with a finding of guilt of first degree murder, before it may consider the question of whether or not a defendant should receive life without parole or the death penalty. Put another way, the determination of whether or not a defendant acted with intent to kill is a separate and distinct prerequisite to the penalty determination.

Petitioner's assertion that, "[i]n the present case, we are not dealing with the elements of an offense," and its

characterization of special circumstances as, "a sentencing consideration" (Pet. 33) misrepresents the function of special circumstances within the California statutory scheme, as that role has been interpreted by the State Supreme Court. In People v. Superior Court (Engert), 31 Cal.3d 797 (1982) and Ramos v. Superior Court, 32 Cal.3d 26 (1982) the California Supreme Court made it clear that the elements of special circumstances are equivalent to the elements of a crime and that murder with special circumstances is an aggravated form of murder carrying its own drastically increased punishment (life without possibility of parole instead of 20 years to life) whether or not the prosecution seeks the death penalty as punishment.

As the California Supreme Court stated in Engert,

> "We must reject the People's argument that when the jury is determining the truth of the charged special circumstances, it is exercising a sentencing function and that, therefore, the requirements of due process for narrowness and clarity are lessened. (See People v. Thomas (1979) 87 Cal.App.3d 1014, 1022-1024 [151 Cal.Rptr. 483].) Proceedings do not move into the penalty, or sentencing, phase until after a defendant is convicted of first degree murder and the special circumstance is found to be true. (Pen. Code, §§ 190.1, 190.2.) In the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole. The fact or set of facts to be found in regard to the special circumstance is no less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which,when found by a jury, define the crime rather than a lesser included offense or component. Thus, there is no reason why due process should not require the same specificity in defining the special circumstance that it requires in the definition of the crime itself." (footnote omitted) 31 Cal.3d at 803.

In Ramos, the California Supreme Court held that special circumstances are equivalent to an offense and are subject to the same challenges under Penal Code section 871 and 995 (motions to dismiss the information for insufficiency of supporting evidence) as other criminal charges, even in cases where the prosecutor was not seeking the death penalty. 32 Cal.3d at 32-34

It is thus clear that under California state law special circumstances come within that category of cases which are not covered by the ruling in Cabana.

> "A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 U.S. 73, 95, and n. 3, 103 S.Ct. 969, 982, and n. 3, 74 L.Ed.2d 823 (1983) (POWELL, J. dissenting); cf. Beck v. Alabama, 447 U.S. 625, 645, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); id., at 22, 99 S.Ct., at 239 (POWELL, J., dissenting)." Id., at 696

Petitioner's assercion that Cabana suggests that "An erroneous finding on a special circumstance was not the type of error covered by Connecticut v. Johnson" (Pet. 21) represents a misinterpretation of California decisional law and misreading of Cabana. There is therefore no reason why this court's review of the decision of the California Supreme Court is warranted. Indeed, petitioner previously sought review of this identical issue in the Garcia case itself, and its petition for writ of certiorari was denied." California v. Garcia, 105 S.Ct. 1229 (1985). The decision in Cabana makes even clearer

the correctness of the California Supreme Court's decision in this case.

D.

This Case is Not Appropriate for the Exercise of this Court's Certiorari Jurisdiction

Respondent notes that, in general, the question of whether state-law error is harmless is itself a state-law question. (See Connecticut v. Johnson, supra, at 88-89, Stevens, J. concurring.) Although Garcia relied on federal authority in reaching its conclusion that Carlos error is prejudicial, 36 Cal.3d at 555, n.10, this is not a case in which there is any persuasive need for review by this Court. Here the decision of the California Supreme Court was in support of federal constitutional principles, not in derogation thereof, so that the ordinary need for grant of review to ensure the supremacy of federal law does not exist. In such a situation, there are two reasons why this Court might still wish to grant review; neither are applicable here.

First, if the issue were a common one raising the prospect of establishing an ill-founded and widely-followed precedent, the Court might feel a responsibility to grant review to prevent that occurrence. But Carlos' reading of an intent requirement into California's felony-murder special circumstances and Garcia's application of that requirement to pending appeals is a unique state statutory development that is unlikely to have any significant implications for other state's laws.

Second, if the state court had concluded that the requirements of the federal constitution were undermining a significant state interest but had nevertheless ruled as it did out of a felt compulsion to comply with federal law, this Court might feel that it was appropriate to grant review in order to

liberate the state court from its misplaced reliance on federal authority. But the California court can hardly be said to have acted out of compulsion in its decisions in Carlos and Garcia. In Carlos it took an admittedly ambiguous statute (Carlos, supra, at 142-143) and chose to construe it to require intent to kill as an element of felony-murder special circumstances. In Garcia it then chose to apply the statute, as construed, retroactively to all pending appeals. (Garcia, supra 36 Cal.3d at 549) It is true that in deciding the standard of error the Garcia court found it useful to rely on federal authority, but it expressly left open the question of whether it would reach the identical result under the state law standard of error. Garcia, supra, at 551, n.7, and 555, n.10. Thus even if this Court were to grant review and ultimately reverse the judgment of the California Supreme Court, it is entirely likely that the state court would still reach the same conclusion as a matter of state law.

Under these circumstances, the exercise of this Court's review power would be unwarranted and inappropriate.

CONCLUSION

In California, a jury finding of intent to kill is required by state law and is not mandated by the federal constitutional considerations outlined in Enmund. Because the intent to kill determination is part of the guilt determination process and not the penalty phase of the trial, the California Supreme Court was correct in its application of the rule of Connecticut v. Johnson to the trial court's failure to instruct the jury that they must find "intent to kill" before they could find that the allegations of special circumstances were true. Accordingly, the petition for writ of certiorari should be

denied.

DATED: June 5, 1986

Respectfully submitted,

Barry Morris

BARRY L. MORRIS, Attorney for
Respondent BERNARD LEE HAMILTON

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1853

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

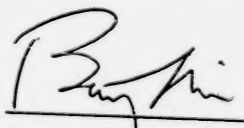
BERNARD LEE HAMILTON,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, BERNARD LEE HAMILTON, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent has at all times during the pendency of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency. Respondent is presently incarcerated in San Quentin State Prison. His affidavit in support of this motion is attached.

DATED: June 5, 1986.



BARRY L. MORRIS, Attorney for

BERNARD LEE HAMILTON, Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. A-805

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

DECLARATION OF
BERNARD LEE HAMILTON

I, BERNARD LEE HAMILTON, being duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the respondent in the above-entitled matter.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated and have been since 1979; I receive no income from earnings and have nc cash or checking or savings accounts.

3. I am unable to to give security for said cause.

4. Counsel was appointed to represent me at trial, on my direct appeal, and on these post-appeal proceedings.

Bernard Lee Hamilton
BERNARD LEE HAMILTON

State of California)
) s.s.
County of Marin)

The foregoing affidavit of BERNARD LEE HAMILTON was subscribed and sworn to me this ___ day of May, 1986.

Notary Public

My commission expires:

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No. 85-1853

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BERNARD LEE HAMILTON,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis, by depositing said brief in the United States Mail, postage prepaid and properly addressed to John K. Van de Kamp, Attorney General, Jay Bloom, Deputy Attorney General, 110 West "A" Street, Suite 700, San Diego, California 92101, and Clerk, California Supreme Couort, 4250 State Building, 455 Golden Gate Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 5th day of June, 1986, at Oakland, California.

BARRY L. MORRIS, Attorney for
BERNARD LEE HAMILTON, Respondent